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MILLER BREWING COMPANY

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Chief, Regulations and Procedures Division
Alcohol and Tobacco Tax and Trade Bureau
P.O. Box 50221
Washington, D.C. 20091-0221

Attention: Notice No. 4 – Flavored Malt Beverages
Dear Sir:

This Comment is being submitted on behalf of Miller Brewing Company ("Miller"), the world's second largest brewer and supplier of several Flavored Malt Beverages. TTB Notice No. 4 raises several important questions about the Flavored Malt Beverage market in the United States; a market in which Miller has invested tens of millions of dollars. Miller is grateful for this opportunity to provide its input on these important issues and is most appreciative of the TTB's careful and methodical approach including the openness with which the TTB has addressed the issue when dealing with the states, the industry, and the public in general.

Overview

To begin, Miller wholeheartedly supports the primary focus of the proposed regulations i.e., permitting the addition of flavorings and other materials containing alcohol to malt beverages only if the alcohol contained in such materials constitute less than 0.5% by volume of the alcohol in the finished product. This proposal is the proper solution under the relevant statutes and the proposed new standard should be implemented. Furthermore, the TTB proposal is the only way to provide stability for and bring certainty to the Flavored Malt Beverage market by discouraging the proliferation of varying state standards.

As for our ability to produce Flavored Malt Beverages under the new standard, thanks to the TTB's open dialogue on this issue over the past year that

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provided early notice of what the new standard would require, Miller is able to unequivocally state that their products can be produced under the proposed standard without compromising taste or our high standards of quality. In fact, Miller has successfully produced prototype Flavored Malt Beverages that comply with the new standard and tested their acceptability with expert tasters as well as various other groups including distributors, retailers, and some state regulators. These tests have confirmed that the reformulated product satisfies the taste profile of the original product.

To be sure, there are costs that have been, and will be, incurred as a result of the TTB's proposed new standard. Miller accepts those costs as a part of doing business in a heavily regulated industry. Miller does, however, have reservations about certain provisions of the proposed new regulations related to labeling and the formula filing requirements that will most likely be easily resolved by further explanation or clarification of the proposed new regulations.

In short, Miller supports the proposed standard for malt beverages (27 C.F.R. §7.11) as well as the proposed standard for a fermented product to qualify for the beer tax rate (27 C.F.R. §25.15). And, except as noted below, Miller generally supports the other proposed revisions to the regulations.

Discussion

As the TTB has recognized, the high profile marketing and rapid growth of the Flavored Malt Beverage product sector has brought it to the attention of both federal and state regulators. The resulting study of these products has raised significant issues concerning their composition, the premises where they may be produced, the appropriate tax rate, and the channels of distribution through which they should be sold. The increased attention also raised issues under the Federal Alcohol Administration Act ("FAA Act") concerning Flavored Malt Beverage labeling and advertising.

From the beginning of this process, it has been apparent that the evolution of Flavored Malt Beverages has raised complex issues requiring analysis and harmonization of the Internal Revenue Code, FAA Act, and state authority under the 21st Amendment to the Constitution. Reasoned consideration of the relevant issues makes it clear that the development of consistent standards is crucial to the stability of the Flavored Malt Beverage market. The proposed standard for malt beverages (27 C.F.R. §7.11) and the complimentary proposed standard for a fermented product to qualify for the beer tax rate (27 C.F.R. §25.15) accomplishes that objective.

As noted in Notice No. 4, the 0.5% alcohol by volume number is significant in

that it provides the dividing point between an alcohol beverage subject to Internal Revenue tax and a beverage containing alcohol that is not subject to tax as an alcohol beverage. The use of what could be characterized as a de minimis threshold such as 0.5% is a common sense approach to the regulation of alcohol beverages considering that small amounts of alcohol are present in many other beverage products such as juice, soft drinks, soda, and non-alcoholic beers made by brewers. The 0.5% standard is also the only way for the new standard to remain true to the TTB's long standing position that utilizes 0.5% alcohol by volume as a threshold to distinguish alcohol beverages subject to the Internal Revenue tax from beverages containing de minimis amounts of alcohol not subject to tax as an alcohol beverage as well as the expansive definition of "distilled spirits" utilized by the FAA Act. See 27 U.S.C. §211(5).

It appears that, without exception, state regulators strongly support the proposed new standard. Given this support and the reality of the FAA Act's penultimate provision, considering other standards would be detrimental to the creation of a uniform standard. As such, the possibility that the pertinent statutes might allow the promulgation of a standard that permits 49% of a Flavored Malt Beverage's alcohol content to be derived from flavors or other ingredients containing alcohol is irrelevant. In short, the only way to avoid the proliferation of varying state standards relevant to Flavored Malt Beverages is to enact the proposed standard limiting the amount of alcohol that can come from flavors or other ingredients containing alcohol to 0.5% by volume of the finished product. This is the position supported by the states which have ample authority under the 21st Amendment to regulate alcohol beverages.

Regarding the TTB's request for comments related to the costs associated with reformulating Flavored Malt Beverages to comply with the new standard, there is little doubt that such costs will be incurred. These costs, however, are viewed by Miller as the cost of doing business in a heavily regulated industry. These costs are also not completely unexpected given that, while Flavored Malt Beverages have been produced pursuant to brewers' reliance on ATF Ruling 96-1, it cannot be said that a revised interpretation consistent with the new proposed standards is unreasonable or unfair. Similar costs are associated whenever a ruling requires change in matters such as labeling which is yet another issue relevant to the regulation of Flavored Malt Beverages.

As noted above, the production of Flavored Malt Beverages pursuant to the new standard is feasible. Miller has successfully produced Flavored Malt Beverages that comply with the new standard and tested their taste with expert panels and various other groups. The results of those tests confirm that Flavored Malt Beverages can be made pursuant to the proposed new standard without

compromising their current taste profile.

Similarly, shelf life and product stability are not expected to be barriers to complying with the new standards. Shelf life will be reduced to that of a traditional beer i.e., approximately four months which is a significant reduction from the six to 12 month shelf life currently applicable to Flavored Malt Beverages produced today. Because it will be consistent with traditional beers, however, we do not anticipate shelf life or product stability to be an insurmountable problem with the reformulated products.

The extended shelf life of Flavored Malt Beverages currently produced and the time necessary to acquire the equipment and begin production of the reformulated Flavored Malt Beverages on a large scale basis raises the issue of the amount of time that will be required to implement procedures allowing Miller to comply with the new standard. Because the TTB notified the industry late last year of its intention to utilize the 0.5% standard, Miller is prepared for a January 1, 2004 implementation. Miller would request, however, that the industry be provided six to nine months from that date to allow product as currently formulated to sell through at retall and reduce the likelihood that product would need to be retrieved from retailers and destroyed.

The implementation or effective date provision of the final rule should also provide that the new standard applicable to Flavored Malt Beverages before they can be taxed at the beer rate is only to be applied prospectively from the date the TTB chooses as the effective date. Furthermore, the effective date provision should provide that the beer tax rate applies to Flavored Malt Beverages removed for consumption or sale on or before the effective date of the new standard, provided they were produced pursuant to the guidelines of ATF Ruling 96-1. Accordingly, we suggest an effective date provision as follows:

The effective date of these rules including the standard for Flavored Malt Beverages to qualify for the beer tax rate shall be January 1, 2004. The beer tax rate shall apply to all Flavored Malt Beverages produced in accordance with ATF Ruling 96-1 and removed for consumption or sale on or before January 1, 2004. Further, Flavored Malt Beverages produced on or before December 31, 2003 pursuant to ATF Ruling 96-1 may continue to be sold at retail until September 30, 2004.

With respect to labeling and advertising, the proposed regulations that

formalize and implement the holdings of ATF Ruling 2002-2 are consistent with Miller's practices and, therefore, we have no objection to those proposed regulations. Miller already voluntarily discloses alcohol by volume on all of its Flavored Malt Beverage products. As such, Miller has no objection to an

alcohol content disclosure requirement for Flavored Malt Beverages that contain flavors with alcohol in them or other ingredients containing alcohol.

If the proposed regulation concerning mandatory label disclosure of alcohol content is meant to include other products, Miller would be opposed to such a requirement. Miller assumes, however, that the proposed rule will only apply to Flavored Malt Beverages that utilize flavors containing alcohol and is not meant to apply to products that utilize, for example, pure honey as a flavor. We believe this to be a correct assumption given the Notice's language that the TTB wishes to restrict the proposed rulemaking concerning Flavored Malt Beverages to products that derive alcohol content from flavors or other ingredients containing alcohol. And, provided this assumption is correct, Miller would have no objection to the required disclosure of alcohol content as proposed.

Also in connection with the required disclosure of alcohol content is the requirement that disclosure be made on the brand label. Rather than require brand label disclosure, Miller requests that flexibility be provided in that disclosure be permitted on any of the labels provided the type size requirements are satisfied. Such an approach would be more consistent with other mandatory label requirements such as the warning label mandated by the Alcoholic Beverage Labeling Act or the requirement that a brewer's address be listed. We believe this flexibility is justified in that there is no empirical evidence concerning consumer confusion relevant to the alcohol content of Flavored Malt Beverages.

The proposed regulations concerning formula filing are consistent with the template currently in use by Miller. The formalization of the formula filing requirement does, however, raise certain issues. Specifically, as drafted, proposed new regulation 27 C.F.R. §25.55 is sufficiently broad that it could be interpreted to require a formula for nearly every fermented product including traditional beers. As such, we suggest a provision excluding such traditional products. It could provide:

**A formula is not required and this section is not meant
to include processes or ingredients customarily utilized
in the production of traditional beers.**

We believe this provision to be sufficiently precise for members of the brewing industry and the TTB alike to delineate between traditional beers and malt beverages that are the subject of special processes or that utilize non-traditional ingredients.

Also with regard to the formula filing requirements is the suggestion that a standardized form be developed. Should the TTB determine that a

standardized form be utilized, Miller requests that a form specific to malt beverages be developed in a cooperative effort between the TTB and the industry. A separate form will allow for customization and would only require instructions relevant to malt beverage production. As such, a separate form is desirable as opposed to the suggestion that the Formula and Process for Wine form (Form 5120.29) be utilized.

Conclusion

Given the history of the Flavored Malt Beverage product category as it has evolved, the time has come for the regulations to formally address the important issues that have been raised. As the only alcohol beverage control agency with nationwide reach, the TTB is in a unique position to bring stability and certainty to the Flavored Malt Beverage market. Wisely, the TTB has taken up the challenge and, in cooperation with the states, industry, and the general public, devised a solution that is both practical and guided by the law. Consequently, we congratulate the TTB on its effort and reiterate our support for the proposed regulations establishing a standard for malt beverages as well as a standard to determine qualification for the beer tax rate.

Sincerely,

Michael T. Jones

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